NO. 84-1694 (2)

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SHARYLAND WATER SUPPLY CORPORATION
Petitioner

versus

JOHN R. BLOCK, Individually and
as Secretary of Department of Agriculture and
J. LYNN FUTCH
Respondents

On Writ of Certiorari to The United States
Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 84-2536

SHARYLAND WATER SUPPLY CORPORATION,
Plaintiff-Appellant,

versus

JOHN R. BLOCK, Individually & as Secretary of U. S. Department of Agriculture, and J. LYNN FUTCH, Individually and as State Director of the Farmers Home Administration,
Defendants-Appellees,

and

DIETER NIPPERT and WIFE,
Intervenors-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

Filed April 26, 1985

Before RUBIN and HILL, Circuit Judges and CASSIBRY*, District Judge.

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*District Judge of the Eastern district of Louisiana, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ A. B. Rubin
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. NO. B-84-149

SHARYLAND WATER SUPPLY CORPORATION

VS.

JOHN R. BLOCK, Individually and as Secretary of U.S. Department of Agriculture, and J. LYNN FUTCH, Individually and as State Director of the Farmers Home Administration

MEMORANDUM AND ORDER
Filed September 10, 1984

Sharyland Water Supply Corporation brings this action seeking injunctive relief to prevent disclosure of certain information they filed with the Farmers Home Administration.

STATEMENT OF FACTS

The Plaintiff, Sharyland Water Supply Corporation, is a water supply corporation located in Hildalgo County, Texas. The original Defendants are officials of the United States Agriculture Department and Farmers Home Administration. On May 21, 1984, Dieter Nippert and wife, Heidemarie Nippert, d/b/a Heide's Hide-away Mobile Park intervened seeking to allow disclosure of the information.

Pursuant to a loan application, Plaintiff filed audit reports with the Federal Home Administration. It is these reports

that the Nipperts sought to obtain in an action filed in state court against the Sharyland Water Supply Corporation. On April 2, 1984, in the 139th Judicial District Court of Hidalgo County, Texas, Judge Raul L. Longoria held that the audits were not discoverable. The Nipperts then requested that the Federal Home Administration release the audits pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552 (1970). Plaintiff now files this action to prevent disclosure.

On May 21, 1984, a hearing was held to determine whether or not the injunctive relief sought should be granted. At that hearing the principal witness was Plaintiff's General Manager, Timothy M. Nicolls. He testified to the present status of the Sharyland Water System Corporation, the general contents of the audit reports and any possible damages that may result from their disclosure.

STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

To obtain preliminary injunctive relief the plaintiff must show that "1) there is a substantial likelihood that he will prevail on the merits; 2) a substantial threat exists that he will suffer irreparable injury if the injunction is not granted; 3) the threatened injury to the plaintiff outweighs the threatened harm that the injunction may cause the defendant; 4) granting the injunction will not disserve the public interest." *Hillsboro News Co. v. City of Tampa*, 544 F.2d 860, 861 (5th Cir. 1977); *Guerra v. Guajardo*, 466 F.Supp. 1046, 1051 (S.D.Tex. 1978).

THE FOIA AND THE 4TH EXEMPTION

The FOIA is designed to promote the disclosure of information. *See Charles River Park "A", Inc. v. Department of*

Housing and Urban Development, 519 F.2d 935, 941, (D.C. Cir. 1975). To prevent disclosure Plaintiff must first prove that the audits are within one of the FOIA exemptions. 5 U.S.C. §552(b). If Plaintiff cannot prove one of these exemptions then the audits must be disclosed. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973); *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 431 U.S. 924, 97 S.Ct. 2199, 53 L.Ed.2d 239 (1977).

Plaintiff alleges that the audits are exempt under the fourth exemption which states:

> "(b) This section does not apply to matters that are . . . (4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4).

Since the audits are not trade secrets, Plaintiff must show that the audits are: 1) commercial or financial, 2) obtained from a person, and 3) privileged or confidential. *National Parks and Conservation Ass'n. v. C. B. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). The first two elements are undisputed and it must therefore be determined whether or not the audits are confidential or privileged.

Information is "confidential" if disclosure is likely to either "(1) impair the government's ability to obtain necessary information in the future, or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id. at 770. In *Continental Oil Company v. Federal Power Commission*, 519 F.2d 31 (5th Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2168, 48 L.Ed.2d 794 (1976), the Fifth Circuit adopted this

standard. To prove substantial competive harm Plaintiff must show "(1) they actually face competition, and (2) substantial competitive injury would likely result from disclosure." *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). Finally, Plaintiff must show specific factual or evidentiary material to support application of the fourth exemption, rather than conclusive and generalized allegations. *Pacific Architects & Engineers, Inc. v. The Renegotiation Bd.*, 505 F.2d 383, 385 (D.C. Cir. 1974).

In the present case Plaintiff has failed to show that they actually face competition or that there will be substantial competition or injury. The testimony shows that Plaintiff has been granted a certificate to serve water to a certain geographic area. Next to some insignificant overlap with other water suppliers, they are the exclusive suppliers for their customers. The testimony also shows that the corporation's certificate is not subject to renewal. Therefore, there are no other suppliers to compete against within their area.

Plaintiff further asserts that disclosure will harm the corporation in its dealings with contractors. The contractors' competitors will not be Plaintiff, but will be other contractors. Their bids must primarily take into consideration what other contractors will bid rather than the funds that are available for buying.

Plaintiff also alleges that this will cause employee "raiding". As was stated in the testimony, even without a disclosure of the audits, there has already been an attempt to hire one of the corporation's personnel. Plaintiff has not shown that mere knowledge of salaries will cause employee "raiding".

Finally, Plaintiff allows any "member" to view these audits. A "member" is any person who is presently receiving water. This "member" can then pass this information on to others. It appears that these corporation "members" are paying customers. A paying customer could release this information to anyone. *See also Cooper v. Department of the Navy*, 558 F.2d 274, 276 (5th Cir. 1977), *modified on other grounds on rehearing*, 594 F.2d 484 (5th Cir.) *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1979) (where the court stated "if anyone can have the desired information everyone can"). In light of the above discussion, the Plaintiff has failed to show any actual competition or substantial harm that would result from disclosure.

Nor has the Plaintiff showed that the audits are privileged. The Plaintiff asserts that the audits are subject to a "lender-borrower" privilege. At the outset it should be noted that this privilege was stated in the legislative history and it does not appear in the act itself. H. Rep. No. 1497 89th Cong., 2d Sess. 10 (1966); 5 U.S.C. §552. Plaintiff has not come forth with any authority, other than the legislative history, which specifically shows the existence of such a privilege under this exemption. It should also be noted that some courts would still require a showing that the matter is confidential even if it is privileged. *Comstock International U.S.A., Inc. v. Export-Import Bank of the United States*, 464 F.Supp. 804 (D.C.C. 1979). However, even if the Privilege exists or a different standard applies, the privilege would not be available, for as was noted earlier, this information can be obtained by any paying customer. In dealing with other exemptions in the act, the courts have noted that a privilege is lost when it is shared with third parties. *See Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242 (D.C. Cir. 1977). Therefore, Plaintiff has waived his right to claim such a privilege.

CONCLUSION

Plaintiff has failed to show that there is a substantial likelihood that he will prevail on the merits or that he will suffer irreparable injury if the injunction is not granted. As such, Plaintiff has not established the proper grounds to obtain injunctive relief.

If is therefore ORDERED that the injunctive relief that is sought be in all things, DENIED.

It is further ORDERED that the Temporary Restraining Order entered on May 10, 1984, be dissolved.

DONE at Brownsville, Texas this 11th day of September, 1984.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Appendix to Petition for Writ of Certiorari has been forwarded to the following:

Ms. Nancy K. Pecht
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Mr. Joseph R. Preston
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Solicitor General
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by depositing said copy in the U. S. Mails, postage prepaid, certified mail, return receipt requested on this 7th day of May, 1985.

Neil Norquest

Neil Norquest